

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JANICE JOHNSON

Claimant

V.

KNIGHT TRANSPORTATION, INC.

Self-Insured Respondent

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Docket No. 1,073,966

ORDER

Respondent requests review of the October 28, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Jonathan A. Bortnick, of Kansas City, Missouri, appeared for the claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from October 27, 2015, with exhibits attached; Claimant's Discovery Deposition from September 15, 2015, and the documents of record filed with the Division.

ISSUES

The parties agree claimant suffered a significant injury primarily to her right knee and lower leg. The ALJ authorized an MRI of claimant's right ankle, apparently to aid in the determination of whether the ankle is or is not related to the original accident, ordered respondent to select an occupational medicine specialist to see claimant and treat any work-related injuries and denied claimant's request for an order requiring respondent to provide a bone stimulator.

Respondent appeals, arguing the ALJ's Order should be reversed as claimant is being provided satisfactory medical care for her displaced bicondylar fracture of the right tibia. Respondent also argues claimant failed to satisfy her burden of proof that she sustained injury to any part of her body other than the right tibia. Therefore, the ALJ erred in directing respondent to provide treatment of body parts other than the right tibia.

Claimant contends the Order should be affirmed.

The issues on appeal are:

1. Does the Board have jurisdiction over this matter?
2. If so, did claimant sustain a personal injury by accident to any body part other than the right knee, arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant has been a commercial driver since 2000. She began working for respondent as an over-the-road driver in August 2014.

On May 14, 2015, claimant arrived at the Mars plant in Topeka to pick up a load to transport to Illinois. When claimant arrived she was told by security that she needed to sweep her trailer out, so claimant parked and climbed in the back of the trailer to complete the task. When claimant was finished, and as she stepped out of the trailer, claimant's foot slipped off the bumper and she fell onto the concrete. Claimant landed on her left hip. As claimant fell she kicked out her right leg out and remembers feeling her knee go one way and her ankle go the other.

The security guard called for help and claimant was given an ice pack for her knee. Paramedics were called and claimant was taken to St. Francis Hospital, where she was told she had broken both bones in her right leg. Claimant underwent surgery and was in the hospital for a week. When claimant was discharged she went to Missouri to stay with her sister. Claimant testified that before she moved, St. Francis arranged for a doctor in Missouri, Todd M. Oliver, M.D., to provide her with physical therapy.

During her visits post-surgery, claimant never reported any complaints, symptoms or problems to any area other than her right leg. Claimant testified, however, that during her therapy with Dr. Oliver, her right leg complaints included her right ankle. Claimant also had complaints in her neck, back and her left hand and shoulder. Claimant claims she informed her case manager of her neck and back complaints and was informed she would have to wait until she came off her walker and cane to see if the problems resolved. Claimant indicated she informed Dr. Oliver of her right ankle problems as soon as she could start walking on her leg, which she thought was in July. Claimant has not received treatment for her right ankle, but x-rays were taken. Claimant does not remember when she reported her left hand problems and has not received any treatment for her hand. She was told to wait until she stops using the cane and walker, to see if the problems go away once she is no longer putting pressure on it.

Claimant does not remember when her back and neck complaints started. She has not received any treatment for the back or the neck because she has not told any physician

about the problems. She claims pain in her neck that shoots down into her low back. She reported this to her physical therapist and received some therapy. Claimant is able to drive and uses a cane.

Claimant was diagnosed with fibromyalgia in 1993 and one of the areas where she had pain was in her back. Claimant was instructed to exercise and lose weight.

In the Order, the ALJ noted Dr. Oliver opined that the right ankle pain is of unknown etiology. The doctor ordered an MRI of the ankle to “rule out osteochondral defect or other pathology.”¹ The Order states:

Osteochondral defect may, or may not, be an injury that arose out of and in the course of this employment related accident. If it is, it may, or may not be the prevailing factor. “Other pathology” may, or may not, relate to the work injury. Given the severity of the right knee injury and its proximity to the right ankle when viewed with the competent medical evidence supports the need for an MRI to assist in determining these, and other, issues which are at the heart of this claim.²

It does not appear the ALJ determined whether the right ankle stems from this accident. That question, along with the issue of prevailing factor, appear to remain unanswered pending the MRI.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-534a(b) states:

(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer’s insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full

¹ P.H. Trans., Cl. Ex. 1 at 6 (Dr. Oliver’s Aug. 24, 2015, office note).

² ALJ Order (Oct. 27, 2015) at 2.

hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

Not every error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury, repetitive trauma or resulting injury?
2. Did the injury arise out of and in the course of the employee's employment?
3. Was notice given?
4. Do certain defenses, that go to the compensability of the claim, apply?³

In this instance, the Order of the ALJ makes no decision regarding the compensability of claimant's right ankle. The Order makes a referral for the purposes of aiding in the determination of the cause of the right ankle etiology, whether it arose out of and in the course of claimant's employment related accident and whether that accident is or is not the prevailing factor.

Until those questions are answered by the ALJ, the Board has no issues to review. Therefore, this Board Member finds this appeal to be premature. In situations where the Board does not have jurisdiction to consider a question on appeal, the Board has no choice but to dismiss the appeal.

³ K.S.A. 2014 Supp. 44-534a(2).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be dismissed for lack of jurisdiction as the issues raised on appeal are not questions over which the Board takes jurisdiction on appeal from a Preliminary Hearing Order.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven M. Roth dated October 28, 2015, remains in full force and effect and respondent's appeal is dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Jonathan A. Bortnick, Attorney for Claimant
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Steven M. Roth, Administrative Law Judge

⁴ K.S.A. 2014 Supp. 44-534a.